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No. 84-1504

In The

Supreme Court of the United States

October Term, 1984

S. G. FRANTZ CO., INC.,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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COUNTER-STATEMENT OF THE CASE

Petitioner, S.G. Frantz Co., Inc., ("Frantz"), has filed a writ of *certiorari* challenging a decision by the New Jersey Superior Court, Appellate Division which sustained an assessment imposed by the respondent, New Jersey Director of the Division of Taxation ("Director"), under the New Jersey Sales and Use Tax, *N.J.S.A.* 54:32B-1 *et seq.* The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(3). Frantz maintains that the assessment levied on its repairing services performed in New Jersey violated the Commerce Clause of the United States Constitution by burdening interstate commerce and violated the Due Process Clause of the Fourteenth Amendment by taxing a transaction, namely the repairing services, with which New Jersey had insufficient nexus.

Frantz manufactures and sells magnetic separators utilized in the industrial processing of materials. Its business also includes the repairing of such equipment for customers. Frantz performed its repairing services entirely in New Jersey upon property owned by its customers and it charged its customers for such repairing services by means of an invoice prepared at its place of business in New Jersey setting forth the repairs performed and the specific charges therefor. All payments for such repair services were received by Frantz in New Jersey. Frantz collected and remitted to the Director the sales taxes on the repair charges in those instances where the repaired equipment was delivered to the customer in New Jersey. Frantz did not collect or remit to the Director sales taxes on those repair charges performed on equipment delivered to customers outside of New Jersey.

The Director assessed sales taxes in the amount of $1,319.63, plus interest, for the period August 1971 to March 1974 against Frantz on the receipts derived from the taxable repair services performed entirely in New Jersey on goods destined for out-of-state delivery. Frantz challenged the assessment before the Tax Court of New Jersey, which affirmed the assessment in a letter opinion dated April 1, 1981 based on its decisions in *Airwork Service Division v. Director, Division of Taxation*, 2 *N.J. Tax* 329 (Tax Ct. 1981) (App. 3a)* (App. 1a). Although the Tax Court permitted Frantz the opportunity to present factual evidence at a trial that there was a duplication of the sales tax imposition by other taxing jurisdictions, Frantz declined that opportunity (App. 2a). Following an appeal by Frantz to the New Jersey Superior Court, Appellate Division, that court, in an opinion dated May 31, 1983 and reported at 4 *N.J. Tax* 534 (App. Div. 1982), affirmed the Tax Court decision, noting that Frantz declined "the opportunity to submit proofs on the issue of 'duplicative taxation'" (App. 29a). Frantz filed an appeal and a petition for certification with the Supreme Court of New Jersey, which the Court dismissed and denied, respectively, in an order dated September 20, 1984 (App. 59a).

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* The matter of *Airwork Service Division v. Director, Division of Taxation*, is before this Court on petition for a writ of *certiorari* under docket number 84-1506.

ARGUMENT

The Petition For Writ Of Certiorari Should Be Denied Since The Due Process And Commerce Clause Challenges To The Sales Tax Assessment Raised By Petitioner Have Been Conclusively Resolved By Previous Decisions Of This Court.

The New Jersey Sales and Use Tax, *N.J.S.A.* 54:32B-1 *et seq.*, is an excise tax imposed upon the receipts derived from certain transactions described as "sales," which term is broadly defined to include:

> Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditioned or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, *including the rendering of any service,* taxable under this act, for a consideration or any agreement therefor. [*N.J.S.A.* 54:32B-2(f); emphasis supplied].

The term "receipt" is defined to include:

> . . . the charge for any service taxable under this act . . . [*N.J.S.A.* 54:32B-1(d)].

Thus the sales tax is imposed upon the receipts derived from sales including the receipts derived from the performance of a taxable service.

The Legislature imposed the responsibility for collecting the tax upon the vendor of the transaction, who is required to collect the tax from the customer upon ". . . collecting the price, [or] service charge, . . . to which it applies . . ." and to remit such tax to the Director. *N.J.S.A.* 54:32B-12(a). The vendor is liable for the tax in the event he fails to collect the tax upon receiving payment from the customer. *N.J.S.A.* 54:32B-14(a). The

statute provides for a presumption of taxability with regard to any of the enumerated services subject to the tax. *N.J.S.A.* 54:32B-12(b).

This appeal concerns those provisions of the Sales and Use Tax which impose a tax upon the rendering of the service of, " . . . maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business. . . ." *N.J.S.A.* 54:32B-3(b) (2). The Tax Court and the Appellate Division correctly determined that the repairing services conducted by Frantz entirely in New Jersey were subject to the Sales Tax regardless of the ultimate destination of the serviced goods. This holding was consistent with *Fisher-Stevens, Inc. v. Director, Division of Taxation,* 121 *N.J. Super.* 513, 298 *A.*2d 77 (App. Div. 1972), certif. den. 62 *N.J.* 575, 303 *A.*2d 328 (1973), which involved the propriety of subjecting to the Sales and Use Tax services performed in New Jersey on behalf of in-state and out-of-state customers by direct mailing companies. As part of their advertising services performed in New Jersey, the direct mailers folded and inserted the advertising paraphernalia supplied by their customers into mailing envelopes, sorted the envelopes by geographic areas and bagged and tied them prior to placing the advertising packages in the mail. 121 *N.J. Super.* at 515. The application of the sales tax to the advertising services performed by the direct mailers in New Jersey was challenged, *inter alia,* on the basis that such a tax may not be levied on services performed on tangible personal property destined for out-of-state delivery following the rendering of the service. The court sustained the imposition of the sales tax upon such services notwithstanding that the materials upon which the

services were performed were subsequently transported out-of-state.

> Appellants' activities here are not subject to multiple taxation. The record shows that their operations take place entirely within the borders of this State. No other state could justifiably tax the sale of their direct mailing services. Appellants contend to the contrary that states in which the mailed advertising material is received could impose a use tax on such flyers or brochures, but this argument misconceives the nature of the sale with their customers. The direct mailers are not selling a product which is transported across state lines and whose use can later be taxed; they are selling a service which is entirely performed within the State. *The "service" does not go through the mails.* [121 *N.J. Super.* at 522; emphasis supplied].

Similarly, Frantz in this case performed the servicing and repairing functions upon which the tax has been assessed solely in New Jersey. No other state could tax those particular functions and, as noted in the *Fisher-Stevens* decision, the actual taxable service could not be transported out of the state.

The contention by Frantz that the Sales Tax assessment violates the Due Process and Commerce Clauses of the United States Constitution is without merit. A taxpayer who asserts that a tax violates the Commerce Clause has the burden of showing the invalidity of the tax. *City of Chicago v. Willett Co.*, 344 *U.S.* 574, 578 (1953). This Court, in a long line of cases, has definitively established that immunity from state taxation is not bestowed upon corporate activities merely because those activities are denominated as part of interstate commerce.

> We start with the proposition that "[i]t was not the purpose of the commerce clause to relieve those

> engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." . . . "Even interstate business must pay its way, . . . as is evidenced by numerous opinions of this Court." [*General Motors Corp. v. Washington*, 377 *U.S.* 436, 439 (1964)].

In *Evco v. Jones*, 459 *U.S.* 91 (1972), this Court reiterated the principle that a state may levy an excise tax upon activities which are part of interstate commerce without contravening the Due Process or Commerce Clauses as long as the activities being taxed are performed or take place within the taxing state. *Evco* sustained the imposition of New Mexico's gross receipts tax on services performed in New Mexico upon goods destined for delivery to out-of-state customers in the context of the Due Process and Commerce Clauses:

> Our prior cases indicate that a State may tax the proceeds from services performed in the taxing State, even though they are sold to purchasers in another State. Hence, in *Department of Treasury v. Ingram-Richardson Mfg. Co.*, 313 *U.S.* 252, 85 *L.Ed.* 1313, 61 *S.Ct.* 866, the court upheld a state gross income tax imposed on a taxpayer engaged in the process of enameling metal parts for its customers. We accepted the finding of the court below that this was a tax on income derived from services, not from the sales of finished products, and we found irrelevant the fact that the sales were made to out-of-state customers. The tax was validly imposed on the services performed in the taxing State. See also *Western Live Stock v. Bureau of Revenue*, 303 *U.S.* 250, 82 *L.Ed.* 823, 58 *S.Ct.* 546, 115 *A.L.R.* 944. [409 *U.S.* at 93].

The United States Supreme Court has thus conclusively established the validity of imposing a tax on services performed in the taxing state under the Due Process and

Commerce Clauses, notwithstanding that the serviced goods are subsequently delivered to out-of-state customers. This principle has been reemphasized in subsequent decisions of this Court involving the constitutionality of state excise tax laws. *Complete Auto Transit, Inc. v. Brady,* 430 *U.S.* 274 (1977); *Standard Pressed Steel Co. v. Washington,* 419 *U.S.* 560 (1975); *United Airlines, Inc. v. Mahin,* 10 *U.S.* 623 (1973). The holding in *Evco v. Jones, supra,* is clearly precedential to this case and conclusively establishes the validity of the present assessment in the context of the constitutional challenge.

The appropriate Commerce Clause and Due Process Clause standards applicable to a consideration of the validity of a state tax were succinctly stated in *Complete Auto Transit, Inc. v. Brady, supra,* 430 *U.S.* at 287. A tax is valid 1) if there is a sufficient nexus to justify the tax; 2) if the tax is fairly related to the benefits provided by the taxing state to the taxpayer; 3) if the tax does not discriminate against interstate commerce; and 4) if the tax is fairly apportioned to local activities and does not result in multiple burdens placed upon the taxpayer. The imposition of the sales tax assessment in this case is consistent with these four tests.

The first test, requiring a sufficient nexus, is satisfied if the actual activity being taxed occurs within the confines of the taxing state. In *Western Live Stock v. Bureau of Revenue,* 303 *U.S.* 250 (1938), this Court sustained a New Mexico tax imposed on the sale of advertising services by newspapers and magazines. The taxpayers in *Western Live Stock* published a trade journal which was prepared, edited and published in New Mexico. The journal was circulated to subscribers in New Mexico

and other states by means of the mail. The journal carried advertisements that were sometimes solicited and negotiated in other states. This Court held the taxed activities to be properly subject to the tax since they were performed in the taxing state:

> All of the events upon which the tax is conditioned—the preparation, printing, and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. [303 *U.S.* at 260].

Similarly, the present factual circumstances establish the appropriate nexus to justify the imposition of the sales tax upon the repairing services since Frantz performed its repairing services entirely in this State.

The second test, involving an analysis of whether the taxing state bestows sufficient benefits upon the taxpayer to justify the tax, is also clearly satisfied in this case. Frantz, since it conducted its repair business entirely in New Jersey, enjoyed the protection and services provided by New Jersey and its local governments. Frantz' customers similarly enjoyed these benefits and were direct beneficiaries of the protection and services accorded by New Jersey which enabled their property to be repaired in New Jersey. The State of New Jersey thus gave something to Frantz and its customers for which it could constitutionally ask a return. *Wisconsin v. J.C. Penney,* 311 *U.S.* 435, 444 (1940).

The third test mandates that the taxing state not place a more onerous tax on interstate commerce than upon domestic commerce. This test is also met in this

case because the New Jersey Sales Tax was uniformly imposed at the 5% rate for the period in question upon all taxable receipts irrespective of whether the receipts related to interstate or intrastate commerce.

The fourth test concerns whether other state taxes of a similar nature are imposed upon the taxable transaction so as to impose "multiple burdens" upon the taxed activity. The trial court, in its letter opinion, permitted Frantz the opportunity to submit proofs at a trial in support of its allegation that the imposition of the New Jersey tax upon the repairing services resulted in multiple tax burdens upon that same transaction. Frantz had the burden to submit proofs on the alleged multiple burdens imposed upon it in this case and its failure to do so was fatal to its case. *General Motors Corp. v. Washington, supra,* 377 *U.S.* at 440. It is obvious that since the repairing services were entirely performed in this State no other state could impose a tax on that same transaction.

This issue was conclusively resolved in *Western Live Stock v. Bureau of Revenue, supra,* 303 *U.S.* at 260, where this Court sustained, as previously noted, the imposition of a New Mexico tax on advertising services performed entirely in New Mexico and noted therein the inability of another jurisdiction to impose a duplicative tax on such a transaction:

> So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine.

Clearly, the holding in *Western Live Stock* is applicable to this case and completely undermines Frantz' contention that the sales tax imposition on the repairing services in some undisclosed manner burdens interstate commerce. No state other than New Jersey has the constitutional jurisdiction to impose an excise tax on the performance in New Jersey of the repairing services by Frantz.

In light of the decisions in *Evco v. Jones, supra, Complete Auto Transit, Inc. v. Brady, supra,* and *Western Live Stock v. Bureau of Revenue, supra,* the constitutional challenge to the sales tax assessment under the Commerce and Due Process Clauses is without merit and clearly does not warrant further consideration by this Court. The petition for writ of *certiorari* plainly does not establish a constitutional question of significant dimension and, therefore, should be denied.

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CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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